COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025888-01**

Cesare Comolli	Employee
ADE Corp.	Employer
Manufacturers of Massachusetts SIG	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
James N. Wittorff, Esq., for the employee
John J. Canniff, Esq., for the insurer

CARROLL, J. The employee appeals the administrative judge's finding of no work incapacity due to his ability to perform the functions of a modified job offered by the employer. Among the arguments raised, first the employee contends that G. L. c. 152, § 35D(3), and/or § 35D(5),[1] do not apply, as the light duty job offered was not

[1] General Laws c. 152, § 35D, as amended by St. 1991, c. 398, § 65, provides in pertinent part:

> For the purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:
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> . . . .
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> (3) The earnings the employee is capable of earning in a particular suitable job, provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written report that a specific suitable job is available to him together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earnings capability under this clause.
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> . . . .
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> (5) Implementation of this section is subject to the procedures contained in section eight. For purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury. The fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the

suitable. Next, the employee argues that the judge erred in not basing his finding of the employee's ability to perform light duty work exclusively on the record medical evidence that he could perform that particular job. On our review of the evidentiary record, the decision is affirmed.

At the time of hearing, Cesare Comolli was a forty-three year old divorced father of two children, ages twenty-five and seventeen. (Dec. 6.) The employee dropped out of high school in the tenth grade and took two college-level courses in computer science and robotics. However, he states on his resume that he graduated from Milford High School and has a degree from Central New England College in computer science and robotics certification courses. Id. He indicated that he acquired computer skills with an expertise in basic programming language, DOS and Windows operating systems and various software. (Dec. 6-7.) His work experience includes self-employment in computer sales, parts, service, rentals, installations, upgrades and training; working in a meat market stocking shelves, cutting meat and making deliveries; assembling mobile homes; computer disc assembly line; batter mixing at a bakery; and a multitude of temporary agency positions, including robotics technician and line machine repairing. The employee began working for the employer in 2000 inspecting and repairing robots, a job requiring frequent lifting from thirty to eighty pounds. (Dec. 7.)

On March 7, 2001, during a break while in the course of his employment, Mr. Comolli slipped on snow and landed on his right buttock, injuring his back, right leg and right hip. Following the incident, the employee was treated at the emergency room of the Milford-Whitinsville Hospital and by Dr. Alan Bell, who diagnosed him with S-1 radiculopathy. He also treated with a chiropractor, Jill Goldberg, underwent physical therapy, and ultimately was referred to the Newton Wellesley Hospital pain clinic. (Dec. 7.)

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insurer or the department shall not be used to support the contention that the employee's compensation rate should be decreased in any proceeding under this chapter.

In August and again in September of 2001, the employer offered the employee a modified job. (Dec. 10.) After attempting to work one day he reported that he was in too much pain to sit and left after a couple of hours. (Dec. 8.) The employee has not attempted to work since. Id.

Initially, the insurer provided payment of § 34 temporary total incapacity benefits without prejudice from March 22, 2001 to September 26, 2001. (Dec. 5.) In accordance with a § 10A conference order, the insurer paid the employee additional § 35 partial incapacity benefits from September 27, 2001 to date and continuing. Id. The insurer appealed to a hearing de novo. (Dec. 3.)

On June 21, 2002, the employee underwent a § 11A medical examination by Dr. Joseph D'Alton. The administrative judge adopted the §11A examiner's opinion that the employee could work full time with a fifteen pound lifting restriction and the option to sit or stand as needed. (Dec. 9.)

Declaring the § 11A report inadequate for the fifteen months between the industrial accident and the date of examination, the administrative judge allowed additional medical evidence to be introduced for the so called "gap period." The judge adopted the August 2, 2001 opinion of Dr. Richard Hawkins, finding that the employee sustained a lumbosacral strain with right S1 nerve contusion causally related to the March 7, 2001 fall at work, and that he was then capable of light duty work with a ten pound lifting restriction and an ability to sit, stand and walk at frequent intervals. (Dec. 8-9.)

The judge further found that the employer's job offer with modified duties comported with the restrictions set forth by Dr. Hawkins as well as those imposed by the employee's treating chiropractor, and that Mr. Comolli could have returned to this position and earned his former average weekly wage but for his "half-hearted attempt." (Dec. 10.)[2] The judge concluded the employee was capable of light duty work with a ten pound lifting restriction with position changes as needed with no work incapacity after

[2] The full-time job was to commence in mid-September, the date from which partial incapacity is claimed, and pay $700.00 per week at $17.50 per hour. (Dec. 10.) The parties stipulated to the employee's pre-injury $683.66 average weekly wage. (Dec. 5.)

September 26, 2001, due to Mr. Comolli's ability to perform the functions of the modified job as offered by the employer. (Dec. 11.) We have the employee's appeal.

The employee's appeal centers on two subsidiary findings made by the judge. Both arguments advanced share the common thread that the modified job offered was not specific, and was inconsistent with the medical evidence presented. First, the employee argues that § 35D(3) and/or § 35D(5) do not apply at all in this case, as the light duty job offered was not "suitable" for the employee, given the disability opinion of Dr. Hawkins. Specifically, the employee posits that the physical demands of the offered job do not accommodate the restriction stated by Dr. Hawkins that the employee would need to work with his hands primarily at waist height. He argues that the physical demands depicted within the job offer twice state that the employee is regularly required to reach with hands and arms. Furthermore, the employee contends that the job offer says nothing about the frequency of the employee's need to sit, stand, stoop, crouch and walk. Finally, the employee points out that although Dr. Hawkins indicates that he did review the job description, he does not mention in his report whether he thinks the employee is capable of same. (Employee brief, 3.) For these reasons, the employee argues that the job offer is not suitable. We disagree.

At the outset it bears repeating that we will affirm a decision where it is "based on evidence and reasonable inferences therefrom and is supported by adequate subsidiary findings." Kakamfo v. Hillhaven West Roxbury Manor Nursing Home, 14 Mass. Workers' Comp. Rep. 195, 198 (2000), quoting Kolkowski v. Sapphire Eng'g, 9 Mass. Workers' Comp. Rep. 295, 296 (1995). It is the administrative judge's responsibility "to weigh the evidentiary value of each of the factors in the record bearing on determination of the earning capacity of the employee. We may not substitute our judgment of such weight for that of the judge who heard the case." Id.

Here, in response to a motion by the insurer, the evidentiary record was opened for the admission of additional medical reports prior to the § 11A examination and report. (Dec. 4.) See Berube v. Massachusetts Turnpike Auth., 12 Mass. Workers' Comp. Rep. 172, 174 (1998), citing George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep.

22, 26 (1996)(case involving period of incapacity preceding § 11A examination warrants admission of additional medical evidence for limited purpose of filling in "gap period").

Turning to the employer's offer of the modified work position, we examine it to ascertain whether it conforms to the requirement that a job be within that employee's performance capabilities. G. L. c. 152, § 35D(3) & (5); Cassidy v. Sodexho USA, 14 Mass. Workers' Comp. Rep. 42, 44 (2000)(employer must, under § 35D(3), put forward a job offer in which the required duties are within the employee's medical restrictions). The modified job offer made to the employee was that of Assembly Technician II. In an August 15, 2001 letter first offering the employee the job, the employer wrote: "According to the . . . medical examination performed on August 2, 2001 by Dr. Hawkins, as well as the guidelines he gave for a return to work, we are offering you a position to return to work that will accommodate the restrictions noted by Dr. Hawkins." (Ins. #6.) In addition to the restrictions noted by the judge (no lifting over ten pounds and the ability to sit, stand and walk at frequent intervals), (Dec. 8-9), Dr. Hawkins had also opined that the employee would need to work with his hands primarily at waist level. (Ins. #12.) The job description enclosed with the August 15, 2001 letter provided, in part:

> The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.
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> While performing the duties of this job, the employee is regularly required to reach with hands and arms. The employee is regularly required to use hands to finger, handle or feel objects, tools, or controls; to reach with hands and arms; to stand, walk, sit, stoop and crouch; to talk and hear. *The employee may be required to climb short heights, and appropriate modifications can be made in terms of bending and stooping.*
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> *The employee must regularly lift and/or move up to 10 pounds. Accommodations will be made to ensure that the employee does not lift over this amount*. Specific vision abilities required by the job include close and peripheral vision, color vision, depth perception, and the ability to adjust focus.

(Ins. #9.) (Emphasis in original.)

As the judge found, the job offer was well within the employee's physical restrictions. A review of the record shows that the administrative judge based his conclusions on both medical and lay evidence. As to the record medical evidence, the judge adopted the opinion of the § 11A examiner in finding that as of June 2002, the employee could work full time and that at a maximum, he is restricted from lifting in excess of fifteen pounds, and would require the ability to sit or stand as needed. (Dec. 9.) Furthermore, for the "gap period," from March 7, 2001 through June 21, 2002, the judge adopted the medical opinion of Dr. Hawkins, the insurer's examining physician, and found that the employee was capable of a modified duty job within the restrictions set by Dr. Hawkins. (Dec. 10.) The employee's argument that the job requirements of the position suggest that the employee must reach above waist height, as forbidden by Dr. Hawkins, is misplaced, as there is nothing in the very detailed job description that requires reaching above the waist. Similarly, the job description does not require standing, walking, sitting, stooping or crouching at intervals prohibited by Dr. Hawkins, and, in fact indicates that modification can be made in terms of bending and stooping, and that accommodations will be made to ensure that the employee does not lift over ten pounds. In those areas where the job description is not as specific, the judge could certainly infer that the job offered was consistent with Dr. Hawkins' restrictions. The August 15, 2001 letter explicitly states that the position would accommodate the restrictions he delineated. (Ins. #6.) In addition, the job description itself states that "[r]easonable accommodations may be made to enable individuals with disabilities to perform the essential functions." (Ins. #9.) Given these factors, we cannot say that the judge erred in finding, in essence, that the modified job offered by the employer was for a "particular suitable job" under § 35D(3). [3]

[3] The situation here is distinguishable from that in Cassidy, supra where we held that the "offer" made by the employer was not for a particular suitable job under § 35D(3). The offer there was for the same full duty housekeeping job which the employee had previously performed, with a general pledge to make accommodations. Although the employer gave the employee a memorandum containing the medical restrictions it understood the treating doctor had imposed,

The employee additionally argues that it was imperative that the judge base his findings of § 35D light duty job performance exclusively on adopted medical testimony addressing the specific job offered. We disagree. Section 35D(3) does not require that a job offer be accompanied by a written report from the treating physician stating that the employee is capable of doing the specific job. Thompson v. Sturdy Memorial Hosp., 11 Mass. Workers' Comp. Rep. 663, 668 (1997). The second sentence of § 35D(3), establishes only that when a job offer is accompanied by a report of the treating physician that the employee is capable of performing such job, that job offer is to be treated as *prima facie evidence* of an earning capacity. Id. However, if the adopted medical opinion is not that of the treating physician, and the physician whose opinion is adopted does not address the specific job offered, the judge may still base his earning capacity determination on the job offer. In such a case, the judge, rather than the treating doctor, must analyze whether the job offer comports with the adopted medical restrictions. See Kakamfo, supra at 199 (where reviewing board upheld administrative judge's decision based on comparing job offer with employee's medical restrictions); Mello v. Bristol County Sheriff's Office, 16 Mass. Workers' Comp. Rep. 376, 377 (2002)(same). The judge here has done that.

The administrative judge's findings of credibility also factored into his incapacity determinations. Upon review of a videotape of the employee's activities, the judge did not credit his testimony as to the degree of pain he experiences or the degree of pain he reported to the § 11A examiner and to the Department. (Dec. 8-9.) As to the job offer, the judge did not credit the employee's testimony that he tried and could not do this job

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it never applied those restrictions to the employee's housekeeping job. Moreover, the employer required the employee to start work before any specific suitable job was made available to her. Id. at 44. Here, the job offered by the employer was a completely different job from that the employee had previously occupied with much lighter lifting requirements (ten pounds as opposed to thirty to eighty pounds) clearly comporting with Dr. Hawkins' restrictions. Furthermore, the detailed job description indicates that accommodations can be made in terms of bending, stooping and lifting, even though none of the duties is clearly proscribed by the adopted medical opinion. (Ins. #9.) We think that the modified duty job description, in combination with the August 15, 2001 letter offering it, is sufficiently tailored to the restrictions Dr. Hawkins imposed to satisfy the requirements of § 35D(3).

but instead credited the testimony of the employer's representative that the employer had an actual position that would accommodate the employee's restrictions, as described in the written job offer, which included the August 15, 2001 letter (Ins. #6), and a description of the specific job offered. (Ins. #9.) (Dec. 10.)[4] Compare Auclair v. Marshalls, 17 Mass. Workers' Comp. Rep. ___ and n. 1 (November 4, 2003)(offer of generic, non-specified job did not meet requirements of particular suitable job, and such defect is not cured by testimony at hearing identifying the particular job intended).

The administrative judge took his findings regarding the credibility of witnesses, the extent of the employee's medical disability as of a date certain, and the availability and suitability of the job, and reached his decision that the employee could have returned to the position offered by the employer. It was not error for the judge to place more weight upon the evidence which he found more credible. Nor was it error to find that the requirements of the offered job were well within the employee's physical capacities and consistent with the adopted medical opinions. Kakamfo, supra at 199. Although the judge did not refer to the statute in his decision, his discussion clearly shows that he conducted the analysis required by § 35 D(3) and (5). His decision to deny and dismiss the employee's claim was based on his finding, warranted by the evidence he credited, that the employee is capable of earning wages in excess of his pre-injury average weekly wage. Cassola's Case, 54 Mass. App. Ct. 904, 905 (2002). The employer complied with the statutory requirements of § 35D and there was no error in the judge's decision to deny and dismiss the employee's claim. We summarily affirm the decision as to all other arguments on appeal.

Accordingly, the decision is affirmed.

So ordered.

[4] It is irrelevant that Joanne Gormley, Human Resources Manager for the employer, testified that the job description comports with the restriction of Dr. Goldberg (the employee's treating chiropractor), (see Tr. 104-105), or that the employer sent the employee a second letter stating that the same job originally offered was consistent with Dr. Goldberg's restrictions, (Ins. #10), since the judge did not adopt Dr. Goldberg's opinion.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **March 16, 2004**

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Patricia A. Costigan
Administrative Law Judge